IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1427 OF 2004

IN

SUIT NO.1427 OF 2004

Maharashtra Power Development
Corporation Ltd. ... Plaintiff.

vs.

1. Dabhol Power Company (DPC)
and others. ... Defendants.

Mr.Navroz Seervai with Mr.D.Khambata, Rahul Chitnis, S.H.Merchant, Ms.R.S.Merchant, Shirish Verdhan and Mahesh Shukla, i/b. M & M Legal Ventures, for Plaintiffs.

Mr.Janak Dwarkadas with Mr.Manmohan & Mr. Salil Shah i/b. A.B.Z Partners, for Defendant no.1.

CORAM: D.K.DESHMUKH,J.

DATED: 25th February, 2005.

P.C.:-

1. This is a Notice of Motion taken out by the

plaintiff. The facts that are necessary and relevant for deciding this Notice of Motion are that, the plaintiff is a company duly incorporated under the Companies Act,1956. It is a shareholder of defendant no.1. The defendant no.1 is a private unlimited company incorporated and registered in India on 29.4.1993. The share holding of Dabhol Power Company is as follows:

(i)Enron Mauritius Company(Defendant no.6),
A Mauritius Company and a subsidiary
of Enron Corporation,USA (Defendant no.5): 65.85%

(ii) Capital India Power Mauritius,
A Mauritius Company and a subsidiary
of GE, USA (Defendant no.3) : 10%

(iii) Energy Enterprise Mauritius Company,
A Mauritius Company and a subsidiary
of Bechtel, USA Defendant no.2):- 10%

(iv) Maharashtra Power Development
Company, An Indian Company and wholly
owned subsidiary of Maharashtra
State Electricity Board: 14.15%

Initially defendant no.6 was holding 80% shares of the defendant no.1. In the year 1998, the plaintiff purchased 37.5% equity holding of DPC-Defendant no.1. As a result, the share holding of defendant no.6 in defendant no.1 was decreased from 80% to 50%. In November/December,2001,

the defendant no.5 Enron Corporation USA filed a Bankruptcy proceedings in US Bankruptcy Court. The defendant no.6 joined the Bankruptcy proceedings in the United States Bankruptcy Court. At this point of time, there were various litigations filed by and against the D.P.C. by various parties including the creditors of defendant no.1. It appears that in March,2004, defendant no.8, defendant no.9, defendant no.11, defendant no.2, defendant no.3, defendant no.5, defendant no.7 and defendant no.10 entered into a Purchase, Transfer and Contribution agreement. The transaction was to be completed in two stages, the first stage is called as 'first closing' and the second stage as 'second closing'. The effect of this agreement, according to the plaintiff, after the first closing would be:-

(i) Defendant no.5 will hold only 50.7% in Defendant no.10 Company and 0.3% in Defendant no.9 Company. Defendant no.3 and Defendant no.2 will hold 24.5% each in Defendant no.10 Company.

(ii) Defendant no.10, thus, will only hold 50.7% in EMC's (defendant no.6) equity holding of 65.85% in defendant no.1. The equity interest of defendant no.10 will amount to 33.385% of total voting power of defendant no.1.

(iii) The equity holding of 49% of defendant no.3 and defendant no.2 in defendant no.10 translates into 32.27% in DPC i.e. Defendant no.1 through the equity holding in Defendant no.6.

(iv) Together with their previous holding of 20% in DPC (Defendant no.1), Defendant no.3 and Defendant no.2 hold 52.27% in DPC (Defendant no.1).

(v) Therefore, Defendant no.5, Defendant no.6 (EMC) and EMC affiliates hold 33.583% in Defendant no.1 (DPC) i.e. Less than 50%.

After second closing, the ownership of defendant no.10 will be among Defendant no.2 - 50%, and Defendant no.3 - 50%. Defendant no.9 and Defendant no.11 will withdraw as partners of Defendant no.10.

2. By order dated 8th April,2004, the above agreement between the parties, according to the plaintiff, was sanctioned by United States Bankruptcy Court. The present suit has been filed in April,2004 by the plaintiff, seeking a decree that the previous transaction between defendant no.5, defendant no.10, defendant no.2 and defendant no.3 cannot be recognized and/or given effect to, by defendant no.1, as it is contrary to the Articles of Association of Defendant

no.1. The plaintiff has also claimed certain ancillary reliefs. The present notice of motion has been taken out by the plaintiff for an order of temporary injunction viz. restraining defendant no.6 from giving effect to the transfer of its shareholding pursuant to the aforesaid agreement.

3. Learned Counsel for the plaintiff submits that the transfer of shares is contrary to the Articles of Association of Defendant no.1. He refers to the definition of term 'Affiliate' found in Articles of Association of defendant no.1 Company. He also refers to definition of terms 'Capital India Power Mauritius', 'Energy Enterprises Mauritius', 'Enron Mauritius Company', 'Maharashtra Power Development Corporation Limited', 'person' and 'transfer'. He refers to the provisions of Article 5.1 of the Articles of Association of Defendant no.1 which lay down that any member can transfer its shares subject to the conditions which are mentioned in Articles of Association. He also refers to the provisions at 5.1.1, 5.1.2, 5.1.3 of Articles of Association. He also refers to the provisions of Article 6 which imposes certain conditions on all members for transferring shares in defendant no.1-company. The main case of the plaintiff is that transfer of shareholding of

defendant no.6 in defendant no.1 pursuant to the agreement referred to above, is contrary to the rights conferred by Articles of Association on the plaintiff of being given the first option to purchase those shares. Learned Counsel also submitted that as per Article 5 if any transfer of shares is contrary to the provisions of Article 5, then those shares which have been transferred contrary to the conditions in Article 5 cannot be counted for any voting purposes.

4. All the defendants have been served. Perusal of notice of motion shows that the principal relief claimed by this notice of motion is that an interim order is sought in terms of prayer clause (b), and that relief is sought against defendant no.6 and the transferees of defendant no.6. But though defendant no.6 and all other defendants have been duly served, except defendant no.1, none of the defendants are appearing. Therefore, at the outset, I pointed out to the learned Counsel for defendant no.1 that as the relief claimed in terms of prayer clause (b) operates only against the defendant no.6 and transferees of defendant no.6, and they have chosen not to appear and contest this Notice of Motion, the defendant no.1 cannot oppose the grant of relief in terms of prayer clause (b). The learned Counsel for

defendant no.1, however, submitted that though defendant no.6 and other defendants are not appearing, the main purpose behind filing this suit and taking out this notice of motion is that the litigation that is started by the defendant no.1 against Maharashtra State Electricity Board, Government of Maharashtra and Union of India should not be proceeded further and should be scuttled. He pointed out that the attempt of the plaintiff is to get control of the Board of Directors of Defendant no.1 so that ongoing litigations between defendant no.1 and M.S.E.B., Government of Maharashtra and Union of India should be scuttled. He therefore, submits that he may be permitted to advance submissions on the relevant provisions of Articles of Association. However, I pointed out to the learned Counsel that I do not propose to hear him on any aspect of the matter which does not directly concern the defendant no.1. I pointed out to the learned Counsel that because the defendant no.6 and other defendants have chosen not to appear in the Court, not to file any affidavits controverting the averments in the plaint and affidavit filed in support of Notice of Motion, the averments made by the plaintiff have to be accepted at their face value, and the defendant no.1 can be heard only to the extent that grant of interim reliefs may adversely affect the interest of

defendant no.1 as a company. Therefore, I heard learned Counsel for defendant no.1 company, only to the extent that grant of interim relief in favour of the plaintiff may adversely affect the interest of defendant no.1 and in relation to the conduct of the plaintiff which according to the defendant no.1, may dis-entitle the plaintiff to grant of interim relief which is in the discretion of the Court. In that regard, learned Counsel for defendant no.1 submits that the grievance is made in the present suit and Notice of Motion, in respect of the agreement which is sanctioned by the United States Bankruptcy Court, and the plaintiff has participated in those proceedings. He submits that the plaintiff is one of the Creditors of defendant no.6 and in that capacity it has sent proof of claim in the proceedings pending before the United States Bankruptcy Court. According to the learned Counsel, a notice of the proceedings before the United States Bankruptcy Court had also been served on the plaintiff. So far as this aspect of the matter is concerned, in my opinion, the submission of the learned counsel for defendant no.1 are not well founded. Though it is clear that the plaintiff was aware of the proceedings in the Bankruptcy Court of U.S.A., against the defendant no.5 (Enron), there is no document on record which conclusively establishes that the plaintiff

was served with any notice from that Court. In my opinion, merely sending its claim to United States Bankruptcy Court as a Creditor, will not amount to participation by the plaintiff in the proceedings before the United States Bankruptcy Court in so far as sanctioning of aforesaid agreement by US Bankruptcy Court is concerned. So far as submission of learned Counsel appearing for defendant no.1 that grant of interim reliefs would adversely affect the interest of defendant no.1, in as much as the plaintiff will try to take control of the Board of Directors, General Body of defendant no.1 Company, is concerned, I put it to the learned Counsel that as presently only first closing has taken place and the second closing is yet to take place, an interim order restraining the defendant no.6 or anybody else from exercising right of vote and other rights in relation to transfer of holdings could be made, and at the same time to protect the defendant no.1 and to prevent the plaintiff from taking undue advantage of the interim order, an order can be made restraining the defendant no.1 from holding its meeting of Board of Directors and General Body, without seeking leave of the Court. Learned Counsel fairly states that if this interim relief is restricted to, transfer of shares at the first closing, no such protection is necessary.

5. Now so far as merits of the controversy are concerned, in my opinion, following articles from the Articles of Association of the defendant no.1 company prima facie establish that the plaintiff had right of preemption in so far as transfer of shares by defendant no.6 is concerned.

'5.1 A Member may transfer its Shares, or grant or transfer warrants or options exercisable or convertible into Shares, only if and to the extent that all of the following conditions (to the extent applicable) are met:

5.1.1 if both:

(a) the Transferee is not an Affiliate of the Transferor Shareholder; and

(b) a principal business of the Transferee and its Affiliates is the same as the strategic business of EMC, CIPM, EEC or their respective Affiliates (it being understood that, for purposes of this Article 5.1.1, the strategic business of EMC and its Affiliates is the development and operation of power or natural gas

projects or fuel supply for those projects, the strategic business of CIPM and its Affiliates is the manufacture and sale of gas or steam turbines for use in power plants or otherwise, and the strategic business of EEC and its Affiliates is the development, design, construction, and operation of electric power project).;

then, for so long as it or one of its Affiliates remains a Member whoever of EMC, CIPM and EEC (or its respective Affiliate or Affiliates) as shall have a strategic business which is so affected consents to the transfer, which consent it may withhold in its sole discretion;

5.1.2 the Transferor Shareholder first complies with the provisions of Article 6, subject to the exceptions in Article 6.3;

5.1.3 to the extent that the Shares to be transferred are 'B' Shares. Members owing among them a majority of the Shares (other than Shares owned by the Transferor Shareholder and its Affiliates) consent to

the transfer, which consent may be withheld in their sole discretion;

5.2 Notwithstanding Article 5.1, transfers to Affiliates of the Transferor Shareholders are permitted, subject to compliance with Article 5.1.3, 5.1.4, 5.1.5 and 5.1.6 only. For purposes of this Article 5.2, Global Power Investments, L.P. Or any fund it owns and controls shall be treated as an Affiliate of CIPM.

5.4 Subject to Regulation 21 and 22 of Table A, the Board shall have no discretion to refuse to approve registration of any transfer of shares if;

5.4.1 a share transfer form (duly executed and stamped) together with the share certificate(s) relating to the shares(s) to be transferred is delivered to the registered office of the Company accompanied by a request for registration;

5.4.2 to the knowledge of the Board having made reasonable enquiry, as evidenced by a vote of two-thirds of its members, the transfer

complies with the provisions of this Article 5; and

5.4.3 all necessary consents or approvals from any governmental or regulatory authority in India have been obtained.

5.6 Before a transfer may occur of:

(a) equity interests in a Member whose only material assets are its shares; or

(b) equity interests in a direct or indirect equity owner of a Member whose only material assets are direct or indirect equity interests in a Member;

unless the transfer is of the type referred to in Article 5.3.2 under Article 6.3, the transfer of equity interests would not have required compliance with Article 6 had the transfer been one of Shares, that member must comply with the provisions of Article 6 of the Articles of Association as if the transfer were a transfer by that Member of a percentage of its total shares equal to the percentage of the direct or indirect equity interests in the Member

transferred for a price equal to the consideration proposed for the transfer of those direct or indirect equity interests.

5.9 If any Member transfers shares in violation of this Article 5, the Person to which the shares are transferred immediately shall re-transfer them to the Transferring Shareholder. Until that transfer occurs, those Shares shall not be counted for any voting purposes.

6.1 Except to the extent provided in Article 6.3 before a Member may transfer any of its Shares, the Transferor Shareholder first must comply with the following provisions;

6.1.1 The Transferor Shareholder shall notify each other member of its intent to transfer shares, which notice must include;

(a) the number of shares to be transferred;

(b) a statement whether the proposed transfer is a sale or some other form of transfer (and if so, what kind); and

(c) a price per share at which the Transferor

Shareholder would be willing to sell the Shares specified in clause (a) under the terms of this Article 6.1.

6.1.2 Each other member shall have the right, either individually or together with other Members, to purchase all (but not fewer than all) of the shares described in the notice under Article 6.1.1 at the price so specified, as follows:

(a) to exercise this right, the Member/s so exercising (in this Article 6.1 each an exercising Member) must so notify the Transferor Shareholder on or before the 30th day following the notice under Article 6.1.1.

(b) if exercising Members provide notices under clause (a) for a number of Shares that exceeds the number of shares specified in the notice under Article 6.1.1 each exercising Member shall have the right to purchase such a number of those shares as is equal to the proportion that the number of shares then owned by such exercising member bears to the number of shares then owned held by all

exercising members, or in such other proportion as they may agree.

6.1.3. If one or more members become exercising members as provided in Article 6.1.2 then on the tenth Business Day following the later of (i) the last day for providing notices under this Article 6.2.1 or (ii) the date on which the requirements of Article 5.4.3 have been satisfied, or on such other date as the Transferor Shareholder and the existing Shareholder/s may agree;

(a) each exercising member shall pay the Transferor Shareholder, by wire transfer of immediately available funds in Rupees or in the equivalent in such foreign currency as the exercising Member and the Transferor Shareholder may agree to a bank account specified by the Transferor Shareholder, the product of the price per share specified in the notice under Article 6.1.1 multiplied by the number of shares that the particular exercising

member is to purchase from the Transferor shareholder, and

(b) the Transferor Shareholder shall deliver to each exercising Member the documents referred to in Articles 5.4 in respect of the shares being sold.

The sale of Shares under this Article 6.1.3 shall be deemed made without representation, warranty, covenant, or indemnity of any kind, other than the Transferor Shareholder owns and is selling the shares so sold free and clear of any charge, lien, encumbrance of any other security interest, other than those specifically created under the Financing Agreements, these Articles and the Shareholders Agreement.

6.1.4 If no member becomes and exercising member as provided in Article 6.1.2 then subject to the provisions of Article 5 and Article 6.2, the Transferor shareholder may proceed with the transfer as described in the notice under Article 6.1.1 to any Person, including any other member or Affiliate, but only it.

(a) the consideration per share obtained is equal to or greater than the price specified in the notice under Article 6.1.1; and

(b) the transfer is consummated on or before the day occurring six months after notice is first provided under Article 6.1.1 (and if the transfer is not consummated on those terms by that time, the Member must comply with the provisions of this Article 6 again.)

6.2 With respect to any transfer of shares by EMC that is neither a transfer under Article 6.1.3 nor a transfer permitted by Article 6.3.

6.2.1 on or before the 20th day preceding the transfer, EMC must notify each other member of the material terms of the transfer;

6.2.2 each other Member shall have the option, exercisable by notice to EMC on or before the fifth day preceding the transfer to have a portion of its shares

included in the transfer on the same terms to which EMC has agreed;

6.2.3 if one or more members exercises the option in the immediately preceding sentence (EMC and each such member being called a participating Member) then each participating member shall transfer on the terms and to the Person to which EMC has agreed (which must be consistent with the terms described in the notice to the other members under Article 6.2.1) a portion of the total shares to be transferred equal to the ratio that participating Member's number of Shares bears to the aggregate number of shares of the participating Members, or in such other proportion as they may agree;

6.3 The provisions of this Article 6 do not apply to transfers;

6.3.1 to an Affiliate of the Transferor Shareholder;

6.3.2 under Article 5.3.2 or 5.7;

6.3.3 in the case of a transfer by CIPM to the venture described in Article 5.2 or any fund it owns and controls;

6.3.4 in the case of a transfer by EMC, if the Transferee is, or is an Affiliate of a fuel supplier under a Project Contract, provided that the provisions of Article 6.2. shall apply to a transfer of the type described in this Article 6.3.3;

6.3.5 in the case of EMC only, transfer of shares to any person provided that EMC and its Affiliates will following the transfer continue to hold 50 per cent or more of the total voting power;

6.3.6 to any person if required by the Shareholders Agreement.

6.4 The failure of any member to exercise the rights provided in this Article 6 and a subsequent transfer of share/s as permitted by this Article 6 shall not, as to any future transfer discharge any shares from any of the provisions of this Article 6 to the extent applicable.'

Perusal of the above quoted articles shows that if the holdings of defendant no.6 in defendant no.1 was to be reduced below 50% then Defendant no.6 was under an

obligation to offer the shares to the plaintiff in accordance with the Articles of Association. Admittedly, no such offer has been made to the plaintiff. The plaintiff has made averments in detail in the plaint showing as to how the transfer of shares by Defendant no.6 is in violation of its rights under the Articles. The defendant no.6 has chosen not to appear and contest that position. Therefore, the averments in the plaint in this regard, in the absence of denial by defendant no.6, will have to be accepted at face value. The denial by defendant no.1 of those averments is of no avail. Both the defendant no.6 and the plaintiff are the share holders of the defendant no.1. In a litigation between defendant no.6 and plaintiff, the defendant no.1 cannot take sides. The defendant no.1 cannot be permitted to defend the case on behalf of the defendant no.6 and other defendants . In order to show its bonafide, the plaintiff has stated that the plaintiff is willing to deposit in this Court the amount that it would have been required to pay to defendant no.6 for purchasing shares as per its entitlement according to the Articles. Learned Counsel for plaintiff submits that the prayer clause (b) be allowed since rights in relation to the shareholdings of defendant no.6 in defendant no.1 should stand transfered after the second closing, because according to the

learned counsel, it is not clear that whether the second closing has yet taken place or not. In my opinion, the submission is not well founded. The following provisions that have been recited in the agreement are relevant:-

> '**Conditions Precedent to Obligations of All parties Under This Agreement to Effect the Second Closing**: The obligations of each of Parties hereunder to consummate the transactions contemplated by this Agreement to occur at the Second Closing are subject to the fulfillment to the reasonable satisfaction of or waiver by such party, on or prior to the Second Closing Effective Date of the following conditions:
>
> (a) .....
>
> (b) Prior to the Second Closing Effective Date, either (i) the Government of India shall have waived the requirement under Section 3(d) of the GOI Guarantee that Enron (directly or through its Affiliates) continue to hold at least 26% of the issued share capital of DPC in order for the GOI Guarantee not to expire or (ii) the GOI Guarantee shall have validly expired or been validly terminated in accordance with its terms and there shall not be (A) any pending claim, action or

proceeding challenging the validity of such expiration or termination or (b) in the good faith determination of the parties hereto after consultation with each other and their legal counsel, any reasonable basis for the maintenance of such a claim, action or proceeding by any person.

3. DURATION OF THIS GUARANTEE:

This Guarantee shall expire at the earliest to occur of the following events:

(a) .....

(b) .....

(c) .....

(d) If Enron Corporation, General Electric Company and Bechtel Enterprises Inc., directly or through their respective Affiliates, together cease to hold at least 50 percent of the issued share capital of the Company at any time between the Financial Close of Phase I and the Entry into Commercial Service of Phase I, or Enron Corporation (directly or through its Affiliates) ceases to hold at least 26 per cent of that issued share capital at any time between such Entry into Commercial Service and the date on which this Guarantee would

otherwise expire under this paragraph (in each case other than by the nationalisation, expropriation, confiscation or compulsory acquisition of any shares in the Company or its assets by action mandated by the Government of India).'

The defendant no.1 in the affidavit filed in this Notice of Motion states that the Government of India has not waived the requirement under Section 3(d) of Government of India Guarantee and it is not expected that such waiver will be forthcoming in the near future, in view of the clear stand of Government of India in its affidavit in the suit filed before the Delhi High Court. Learned Counsel for defendant no.1 has also stated that the defendant no.1 is willing to file an undertaking in this Court, undertaking to give Four weeks notice to the plaintiff in case the second closing is likely to take place. In these circumstances, therefore, in my opinion, it will be appropriate to restrict the interim relief only to the shareholding of defendant no.6 which is to be transferred pursuant to the first closing. In these circumstances, therefore, in my opinion, the plaintiff is entitled to an interim order in terms of prayer clause (b) subject to the modification that instead of 65.85%

equity shares mentioned in prayer clause (b), 32.2665% of equity shares shall be substituted. It is accordingly so ordered.

5. Learned Counsel appearing for plaintiff submits that the plaintiff should also be granted interim order in terms of prayer clause (a)(i). He submits that because of Section 5.02 of the Agreement which has been sanctioned by United States Bankruptcy Court, it is necessary to grant interim relief in terms of prayer clause (a)(i). According to the learned Counsel, because of Section 5.02 of that Agreement, D.P.C. has to grant general release in favour of defendant no.5 and its affiliates, of all claims of D.P.C. relating to or arising out of defendant no.5 and its Affiliates' ownership of defendant no.1. Learned Counsel submits that this arrangement brought about by the order, is fraudulent and obtains undue advantage for the defendants. There are serious allegations made in relation to this arrangement. These allegations are against the defendant no.6 and other defendants. However, they have chosen not to appear in the Court and contest those allegations. In my opinion, however, considering that the relief that is claimed by prayer clause (a)(i) is vague, it needs to be restricted only to

Section 5.02 of the Agreement which reads as under:-

> 'Section 5.02. DPC Release; Vote of Purchaser Designees to DPC Board; Assignment of Contractor Claims. (a) Prior to and after the First Closing Effective Date, GE and Bechtel shall use commercially reasonable efforts to cause DPC to provide a general release in favour of Enron and its Affiliates and their respective directors, officers, employees and representatives of Claims of DPC relating to or arising out of Enron's and its Affiliates' ownership of DPC or involvement with the Project, in exchange for a like release (excluding the claims referred to in Section 5.02(c)) of DPC from Enron and its Affiliates and their representatives pursuant to a mutual waiver and release agreement substantially in the form of Exhibit 5.02A.'

In my opinion, appropriate order to be passed in this regard would be that to restrain the defendants from giving effect to the arrangement which is contained in Section 5.02 of the aforesaid Agreement which is quoted above, until further orders of this Court. In the facts and circumstances of this case such an interim order is

required to be made which would prevent the defendant no.6 from taking advantage in its action in the matter of transfer of its shares in violation of the articles, and at the same time, the plaintiff also cannot be permitted to create an irretrievable situation taking advantage of the interim order. It is therefore that I had enquired with the learned Counsel for the defendant no.1, whether it would be necessary to make an order preventing the holding of meetings of the Board of Directors and the General Body without the leave of the Court so that the Court can see that the plaintiff does not take undue advantage of the interim order, but the learned Counsel, as observed above, stated that such an order is not necessary if the Court makes an interim order in relation to the first closing. Taking overall view of the matter, in my opinion, following order would meet the ends of justice.:-

(i) The defendants are restrained from giving effect to the arrangement contained in Section 5.02 of the Agreement dated 5th March,2004 at 'Exhibit C' to the plaint, until further orders.

(ii) Notice of Motion is granted in terms of prayer clause (b) with the modification that for the figure '65.85%' in the prayer clause, figure '32.2665%' shall

be substituted.

(iii) The plaintiff to deposit in this Court, an amount of Rs.18,00,00,000/- (Rupees Eighteen Crores only) within a period of two weeks from today. The Prothonotary and Senior Master of this Court shall invest this amount in fixed deposit in a Nationalised Bank during the pendency of the suit.

(iv) Defendant no.1 is directed to file an undertaking in this Court, undertaking therein to give four weeks notice to the plaintiff in case second closing is likely to take place. Defendant nos.2 to 14 are also directed to give similar notice in case second closing is likely to take place.

(v) Notice of Motion is disposed of.

25.2.2005 ---